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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In the Matter of:

RESIDENTIAL CAPITAL, LLC, Case No. 12-12020-mg

Debtors.

- - - - -x

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Case No. 13-01277-mg

et al.,

Plaintiffs,

- against -

UMB Bank, N.A., et al.,

Defendants.

- - - - -x

RESIDENTIAL CAPITAL, LLC, et al., Case No. 13-01343-mg
Plaintiffs,

- against -

UMB Bank, N.A.,
Defendants.

- - - - -x

United States Bankruptcy Court
One Bowling Green
New York, New York

July 15, 2013
11:04 AM

B E F O R E:
HON. MARTIN GLENN
U.S. BANKRUPTCY JUDGE

1 (CC: Doc #3923) Motion for Omnibus Objection to
2 Claim(s)/Debtors Fourth Omnibus Objection to Claims (Late-Filed
3 Borrower Claims). Hearing RE: Responses of Mahnaz Rahbar, Beth
4 M. Tsounakas, Christine and Harris Davis, Mark and Lynn
5 Ostreicher, Kenneth and Kristi Walker, Aisha M. Harris, and
6 James R. And Terri L. Fox adj. to 7/26/2013 at 10 a.m. Hrg.
7 going fwd on remainder of objs.

8
9 (CC: Doc# 3924) Motion for Omnibus Objection to Claim(s) (Late-
10 Filed Borrower Claims) Hearing on matters relating to the
11 Opposition of Tracey J. Marshall, Response of Norma G. Green,
12 and Response of Todd Phelps are being adjourned to July 26,
13 2013. Hearing on the remainder of claims will be going
14 forward.

15
16 (CC: Doc #3925) Motion for Omnibus Objection to
17 Claim(s)/Debtors Sixth Omnibus Objection to Claims (Duplicate
18 Borrower Claims)

19
20 (CC: Doc no. 3926) Motion for Omnibus Objection to
21 Claim(s)/Debtors' Seventh Omnibus Objection to Claims (Amended
22 and Superseded Borrower Claims) filed by Norman Scott Rosenbaum
23 on behalf of Residential Capital, LLC Response of Ronald P.
24 Gillis has been resolved; hearing on the remainder of the
25 objection will be going forward.

(CC: Doc# 3927) Motion for Omnibus Objection to
Claim(s)/Debtors Eighth Omnibus Objections to Claims (Redundant
Borrower Claims).

(CC: Doc #3985) Debtors Ninth Omnibus Objection to Claims
(Duplicative of Indenture Trustee Claims).

Adversary proceeding: 13-01277-mg Official Committee of
Unsecured Creditors et al. v. UMB Bank, N.A. et al
Status Conference Regarding Discovery Requests.

Adversary proceeding: 13-01343-mg Residential Capital, LLC, et
al. v. UMB Bank, N.A., in its Capacity as Indenture Trust
Status Conference Regarding Discovery Requests.

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RESIDENTIAL CAPITAL, LLC, ET AL.

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1 P R O C E E D I N G S

2 THE COURT: Please be seated. We're here in
3 Residential Capital, number 12-12020.

4 MR. WISHNEW: Good morning, Your Honor. Jordan
5 Wishnew, Morrison & Foerster for the debtors. I will be
6 addressing the omnibus claims objections under numeral I on
7 today's agenda and then ceding the podium to my colleague, Ms.
8 Levitt for the JSN status conference.

9 Item number one deals with some carryover claims from
10 the first omnibus objection. Specifically, they're the claims
11 of Ms. Genesco and Krolon Tracht (ph.). The Krolon Tracht
12 matter is being carried to July 26 to see if we can resolve it.
13 And Ms. Genesco's claim has been consensually resolved. We've
14 spoken with her. She understands the basis for our objection
15 and agrees to the relief being sought. We filed a statement
16 this morning to that effect and we'll submit an order to
17 chambers consistent with that.

18 THE COURT: Okay.

19 MR. WISHNEW: The second item on the agenda is the
20 third omnibus claims objection. That again deals with a
21 carryover related to the Durbin Crossing claims. There was a
22 motion filed last week -- late last week to abandon the related
23 properties and that --

24 THE COURT: You said third. I don't have a third
25 omnibus objection on the agenda.

1 MR. WISHNEW: Item two, Your Honor.

2 THE COURT: All right. Yes, I see it.

3 MR. WISHNEW: Okay.

4 THE COURT: Yes, okay. I'm sorry. I'm looking at the
5 list in the binder. Go ahead.

6 MR. WISHNEW: No problem, Your Honor. So that matter
7 is -- will resolve itself as a result of the abandonment motion
8 filed late last week. That will resolve the claims and that
9 matter is being heard; that is, the abandonment motion is being
10 heard on the 26th.

11 THE COURT: All right.

12 MR. WISHNEW: With regards items three through eight
13 on the agenda, those deal with the fourth through ninth omnibus
14 matters. Over the -- since the past week, we've received
15 certain responses from numerous borrowers with the assistance
16 of both Kramer Levin and SilvermanAcampora, we have either
17 agreed to adjourn approximately ten of those matters to July 26
18 or the parties have understood the relief being sought with
19 regard to their response and have essentially agreed to the
20 relief that the debtors were seeking in connection with these
21 omnibus objections.

22 And again, we filed a statement this morning at --
23 clarifying how we resolved matters, I think in the fourth,
24 sixth, seventh, eighth and ninth omnibus objections and we also
25 filed a notice of adjournment late last week with regards to

1 matters in the fourth and fifth omnis.

2 We have clean forms of order and blacklines for Your
3 Honor to consider. I believe those were also e-mailed to
4 chambers this morning. I know that Mr. Morse is on the phone
5 in connection with the sixth omnibus objection. In his
6 conditional response, he wanted clarification that essentially
7 the parties were reserving their rights and the surviving
8 claims would not be affected and, in fact, that is the case.
9 The sixth omnibus matter was a duplicate borrower claims and
10 Mr. Morse had four claims; two of them were exactly the same as
11 the two surviving. We will keep the surviving in the register.
12 We reserve our rights to file further objections and Mr.
13 Morse's rights to respond to those objections are reserved, as
14 well. So, we would ask that the matter move forward and we be
15 allowed to expunge the duplicative claims identified on Exhibit
16 A to the form of order.

17 THE COURT: Mr. Morse, do you want to be heard?

18 MR. MORSE: Your Honor, what the lawyer just said is
19 fine. We have no objection to the expungement as long as our
20 two original claims remain intact.

21 THE COURT: All right. Thank you very much.

22 MR. WISHNEW: Unless Your Honor has any questions, I
23 believe that really addresses the matters in omnibus' four
24 through nine today.

25 THE COURT: How many -- I think I have the list but

1 how many claims are they going -- how many have you withdrawn
2 from the objections. How many is it going forward with respect
3 to the --

4 MR. WISHNEW: Sure. So, between the six omnibus
5 objections today, 490 claims were dealt with. Ten and I
6 believe an eleventh this morning, I think chambers was
7 contacted this morning or received a letter this morning from
8 Mr. and Mrs. Bartaz (ph.). I don't believe it hit the docket
9 but that will get added to the list of adjournments; bring the
10 total adjournments to July 26 to eleven.

11 THE COURT: Okay.

12 MR. WISHNEW: Other than that, it would be I think 480
13 claims that would be expunged from the register, Your Honor.

14 THE COURT: All right. Does anybody wish to be heard
15 with respect to the omnibus objections? All right. So, the
16 objections are sustained, other than as to those which have
17 been withdrawn and subject to the reservation that you've put
18 on the record.

19 MR. WISHNEW: Would Your Honor like hard copies or
20 should we just work with electronic?

21 THE COURT: We'll just hand up discs.

22 MR. WISHNEW: Okay.

23 THE COURT: Okay?

24 MR. WISHNEW: Yes.

25 THE COURT: Thank you very much.

1 MR. WISHNEW: Thank you very much, Your Honor.

2 THE COURT: All right.

3 UNIDENTIFIED SPEAKER: May I be excused, Your Honor?

4 THE COURT: Yes, you may.

5 UNIDENTIFIED SPEAKER: Thank you.

6 MR. WISHNEW: Thank you, Your Honor.

7 THE COURT: Thank you. All right. So, we're going
8 to move forward now with the status conference with respect to
9 the two complaints; the committee and the debtors' complaints
10 against UMB, the JSN matter.

11 MS. LEVITT: Your Honor, Jamie Levitt from Morrison &
12 Foerster on behalf of the debtors.

13 Your Honor, first I want to apologize for all of the
14 parties for the morning correspondence. I do greatly apologize
15 for that. We did try our best to get a joint statement
16 negotiated last weekend into the Court. As I said, we provided
17 it to counsel for the JSNs at 2:30 on Thursday. We didn't hear
18 back until about 9 p.m. last night. So, Your Honor, we have
19 not had a chance to analyze, discuss with our clients and are
20 therefore not in a position to discuss the statement. Again, I
21 apologize for that situation.

22 I also thought we were essentially done with discovery
23 disputes. We had what I thought were product meet and confers
24 last week and I thought we were down just to the issue of
25 mediation, confidentiality. The JSNs this morning, although I

1 didn't hear from them on this last week raised two new issues
2 again that I thought were entirely resolved but we will address
3 those, Your Honor.

4 Do you want me to go through each of those three or
5 the mediation confidentiality or does the Court have any other
6 questions?

7 THE COURT: Well, I gather that with respect to the
8 statement of issues, the parties are going to continue to try
9 and resolve the issue. I don't know how many open issues there
10 are. Ms. Levitt, when do you think realistically, you'll be
11 able to either resolve or conclude that you can't?

12 MS. LEVITT: Your Honor, I would sure hope tomorrow is
13 possible.

14 THE COURT: Okay.

15 MS. LEVITT: Or in case I mean no way --

16 THE COURT: Mr. Morris?

17 MS. LEVITT: Perhaps not with the JSN counsel but we
18 will review it today.

19 THE COURT: Okay.

20 MS. LEVITT: I don't think we're all that far apart.
21 I've done a quick read. I think we can get there. I guess I
22 would just ask the Court's intervention that counsel for the
23 junior secured notes be required to respond a little more
24 quickly. But aside from that, I think we can get through this
25 in the next day or two.

1 THE COURT: Well, my response is to lock you all in a
2 room and say don't come out until you're done, you know,
3 however long that takes --

4 MS. LEVITT: Maybe I want to be careful what I wish
5 for.

6 THE COURT: -- that's fine, you know, I am --

7 MS. LEVITT: Okay. Well, we will endeavor to do this
8 in the next day or two.

9 THE COURT: Okay. Let me just -- okay. I want this
10 to get resolved quickly, okay? You know, I leave on vacation
11 at the end of the month. There's a lot of things that are
12 going on that -- you know, discovery and things that are going
13 to go on. You need to get the issues clarified, so everybody
14 knows what it is you're preparing for trial on.

15 Mr. Shore, when do you think you can finish this up?

16 MR. SHORE: There are actually two documents that are
17 in the works. We got one on Thursday, which is the actual
18 statement of issues; that which is going to be phase one, phase
19 two. Again, I don't know that we're that far apart. We came
20 back with some textual evidence us on that. What hadn't been
21 done and which we did Friday and over the weekend was the
22 modification to the scheduling order to talk about the
23 discovery issues. And that's what we haven't talked about,
24 Your Honor. We had addressed documents. What are we doing
25 with respect to documents? What are we doing with respect to

1 depositions and the like? We provided that to them. I believe
2 we can engage quickly on this and get it done, a couple of
3 days, I think is my assessment.

4 THE COURT: You know, the best way to engage quickly
5 is do it in the same room and let's avoid dueling e-mails,
6 resulting in dueling correspondence with the Court. So, I am -
7 -I am directing you all to meet face-to-face and get these
8 issues resolved. I mean as to the statement of issues, I can't
9 believe you can't get it resolved.

10 MR. SHORE: I don't --

11 THE COURT: I want it done sooner rather than later
12 because you all -- so you all can get on with the rest of your
13 work.

14 MR. SHORE: Very good, Your Honor.

15 MR. HOROWITZ: And, Your Honor, Greg Horowitz on
16 behalf of the creditors committee. I think we're very close on
17 the statement of issues. I'm confident that will be done. We
18 do have a very -- we have a big deadline tomorrow for motions
19 to dismiss. So I don't anticipate that will get in the way but
20 a face-to-face meeting in the next twenty-four hours will be
21 difficult for us.

22 THE COURT: Okay. All right. My computer managed to
23 shut itself down updating, so I can't -- I've got to wait until
24 it reboots here to get -- look at the schedule.

25 Do you know what, yes, I will give you a couple of

1 more days to get it done but it's got to get done, you know,
2 certainly no later than Thursday of this week this needs to be
3 resolved or I will just resolve it. Okay.

4 So, obviously I read the two letters that were sent
5 today; the White & Case letter and the Morrison & Foerster
6 letter and with respect to the discovery disputes some of this
7 deals with what has to be logged in the privilege log and then
8 ultimately what privilege may or may not apply.

9 So, let me deal first with the common interest
10 privilege. Okay. You may have all looked at these already but
11 I want to call to your attention one published opinion in one
12 order that I've entered. The published opinion is In re Velo
13 Holdings, Inc., 473 B.R. 509, (Bankr. Court S.D.N.Y. 2012)
14 which deals specifically with common interest privilege.

15 The issues involved in Velo were a little different
16 than the issues here but I set out the legal principles that
17 apply to common interest privilege. Closer to the mark for you
18 all is an order that I entered in In re Almatiss B.V. -- Almatiss
19 is A-L-M-A-T-I-S, B.V. It's case number 10-12308 and it's ECF
20 docket number 222. And it's order re: discovery dispute
21 between Oaktree Capital Management and junior lenders. And it
22 specifically dealt with the applicability of common interest
23 privilege to a plan support agreement, to the communications of
24 the parties regarding plan support agreement.

25 When you look at it, you'll see that the discussion in

1 the log, I cut and pasted and put into the Velo opinion for the
2 most part but it dealt specifically with common interest
3 privilege assertions with respect to communications of the
4 parties to a plan support agreement, very much like what you
5 raised but what you'll see is that the order in turn refers to
6 an earlier order I entered in the case which overruled in part
7 objections and then in the order that I've just referenced, ECF
8 222, I concluded in substance that common interest privilege
9 would not apply to communications any earlier than the signing
10 of the PSA. And as to communications after the PSA were
11 signed, I basically said they may be protected by common
12 interest privilege but you've got to go through the various
13 tests that the Courts have established that determine whether
14 specific communications were or were not protected by the
15 common interest privilege. And I'll just read you from page
16 5 -- one paragraph from page 5 because it may provide you some
17 guidance.

18 "Once the plan support agreement was signed on March
19 7, 2010, Oaktree, the debtors, and the senior coordinating
20 committee may" -- and that's in italics -- "may well have
21 shared a common legal interest sufficient to invoke the
22 privilege with respect to drafts and e-mails of the disclosure
23 statement and plan. The Court cannot, however, finally resolve
24 the issues with respect to such documents without a fuller
25 record. A privilege log, declarations and deposition testimony

1 is required before the Court can resolve the privilege issues
2 with respect to documents exchanged after March 7, 2010. If
3 necessary, the Court will review the alleged privileged
4 documents in camera."

5 There's more in here but basically, when you read Velo
6 and you read the Almatris order, just the fact that parties have
7 signed a PSA is not in itself sufficient to determine whether
8 there's common interest privilege. So, you can all -- you all
9 ought to read these two and Almatris, I think is closest to the
10 mark for what the issue is you seem to be raising.

11 And, you know, the last paragraph of this Almatris
12 order, "The parties should confer with respect to the remaining
13 discovery issues not resolved by this order. They should
14 endeavor to agree on procedures for resolving the disputes with
15 a court hearing, if necessary. Counsel should contact the
16 Court to make arrangements for a hearing."

17 Once I provided this guidance, they resolved the
18 remaining issues and I didn't have the matter back again. So,
19 to the extent that the debtors or the committee or others were
20 seeking not to have to log communications as to which they're
21 asserting a common interest privilege, I think you're going to
22 have to do that. It's what I required in Almatris and that's
23 what I am going to require here, I mean unless you can work it
24 out. I don't know where you're -- whether your dispute is all
25 post-signing of the PSA, pre-signing of the PSA --

1 MS. LEVITT: It's all post-signing, Your Honor.

2 THE COURT: Okay. And that's, you know -- and you'll
3 see that I said, yeah, it could. There could be common
4 interest privilege. It has to relate to a legal matter. So
5 you'll -- in that, I mean I certainly can't determine from the
6 correspondence that's been submitted. So, you know, you ought
7 to read this stuff and see whether you can agree how you're
8 going to go about resolving the remaining issues and if
9 necessary, you'll go forward, create a privilege log and
10 what -- I believe what I did in the Almatris case as I do in
11 most all discovery disputes because I couldn't -- I didn't
12 resolve the issues in Almatris without something in writing, so
13 I gave the parties an opportunity to submit short letter briefs
14 and it got resolved very quickly. I think, you know, this
15 order was entered within a day or two after I got the five-page
16 letter briefs, I think is what they were. So that's my
17 guidance to you all with respect to the common interest
18 privilege issues.

19 With respect to the mediation privilege, Mr. Shore,
20 why don't you explain to me why you think you're entitled to
21 communications relating to -- for which mediation privilege
22 privileges have been asserted?

23 MR. SHORE: Let me maybe better articulate why we're
24 here right now and then explain what we want with respect to
25 mediation privilege at this point. We've agreed on almost all

1 custodians. We've agreed on search terms. We're hoping that
2 the debtors are starting to upload the documents and starting
3 to review the documents.

4 What's been articulated to us about that review is
5 when doing the documents, they're going to mark documents
6 privileged and then mark documents not privileged and
7 producible. And the not privileged will be a mélange of
8 attorney-client, mediation discussions, work product
9 discussions, joint defense discussions and the like and then
10 we're going to end up with some database of seven million
11 privileged documents. We're not asking for all those to be
12 scheduled. One category of those will be mediation privileged
13 documents.

14 It may be that when they decide to proceed with phase
15 one or phase two, that they do not assert that what happened in
16 the mediation is relevant to anything that's going on. Where
17 we are having a problem and it came up in connection with the
18 FGIC discovery not having to do with this action at all. We're
19 not going to discuss that here but fundamentally, to the extent
20 the debtors are going to be taking the position that the
21 mediation was an arms' length process that resulted in
22 settlements that disposed of phase one or phase two issues, we
23 have a problem with them then taking the position
24 categorically, you're not entitled, not even on an attorneys
25 eyes only basis or otherwise, those documents are privileged

1 from disclosure. No discussion that any party had either at
2 the mediation or in connection with the mediation will be
3 produced.

4 If that's the position they're going to take, they
5 can't then also take the position that but the mediation was
6 robust and arms' length and there was back and forth that took
7 place and this was a material element of the mediation and
8 whatnot.

9 So what we're asking now is that when they're in the
10 process of reviewing the documents in the first instance,
11 segregate out that to which they say there's going to be a
12 mediation privilege asserted. We'll figure out how many
13 documents there are, figure out whether a log of that is going
14 to be necessary. If there are only a thousand documents, a lot
15 isn't a problem. If we're kicking out hundreds of thousands of
16 documents, we'll have to talk about a way in which we configure
17 out how much of that is are you going to the mediation? Yes,
18 I'm going to the mediation. How about you? Yes. All that
19 kind of stuff to take out, so that we're really actually
20 talking about substance.

21 It may be that they never take the position in phase
22 one or phase two that the mediation is relevant and what was
23 discussed in the mediation is in any way relevant to Your
24 Honor's determinations but if they do, I don't want to be in a
25 position where the debtors say but now we have to go back

1 through seven million documents and try to pull out that which
2 was the mediation. I'm just trying to at the start before they
3 start the sorting process, let's pull mediation out aside.
4 Again, common interest should be pulled out from our
5 perspective and the work product. That is to the extent that
6 they -- it sounds like that although from the letter this
7 morning, we may have resolved that now but to the extent that
8 there are direct communications between business people and the
9 FAs, that's not going to be claimed to be work product, you
10 know, on a blanket basis. If they want to claim privilege with
11 respect to that, let's separate that out and then we'll come up
12 with some sizable or some quantum of documents and we can
13 decide what to do. But I just don't want to be given how fast
14 we're moving, in a position where we're getting delay at a
15 later date because they go back and say well, we got the big
16 bucket of non-producing -- responsive but privileged documents
17 and then say but we haven't sorted that in any way because now
18 is the time, as a practical matter in reviewing -- no one's
19 reviewing hard documents, they're just saving screen shots.
20 They should be sorting those now and we can address them later.
21 It may be that we can work out issues with respect to joint
22 defense and the like. I just don't want to be in the process
23 where you have to delay later if Your Honor rules well, now
24 you've opened the door on mediation documents. You're going to
25 have to produce them and then them say well it's going to take

1 weeks for us to do that.

2 THE COURT: Ms. Levitt?

3 MS. LEVITT: Your Honor, we are never going to open
4 the door to the production of mediation documents. I think
5 that the general order of this Court, M-390, in addition to
6 your Court's December -- this Court's December 26, 2012 order,
7 could not be more clearer that all discussions among any
8 mediation parties in or out of the presence of the mediator,
9 all mediation statements and other documents or information
10 provided to the mediator or the mediation parties in the course
11 of the mediation and go on to list all different things, shall
12 be strictly confidential and not admissible for any purpose.

13 THE COURT: So that would include -- I take it you
14 would agree that the proponents of the plan or in the case of
15 FGIC -- the FGIC settlement, the proponents of the FGIC
16 settlement cannot have a reliance on mediation defense.

17 MS. LEVITT: Correct.

18 THE COURT: I mean it's just like you can't assert a
19 reliance on advice of counsel and then refuse to produce the
20 advice you got.

21 MS. LEVITT: Correct, Your Honor and we've actually
22 had that conversation numerous times with the junior secured
23 noteholders. We are not asserting reliance on mediator. They
24 will test, as they want or object to the process but the
25 mediation was held, we believe with Judge Peck in a good faith

1 proceeding and none of those documents are admissible.

2 Therefore, we don't understand why we're here talking about
3 discovery requests about them or logging of them. It is an
4 improper request. Logging is unnecessary because they're not
5 going to be able to challenge our mediation confidentiality
6 objection.

7 We also think that this is clearly a phase two issue.
8 We're talking about approval of the global settlement that was
9 reached in the mediation. It has nothing to do with this
10 proceeding. So, putting that piece aside as well, we don't
11 believe that we should be forced in this proceeding to be
12 collecting, logging, reviewing, mediation confidentiality
13 materials.

14 I don't know how many more times the Court is going to
15 have to go through this but I thought that was also determined
16 in the FGIC proceeding.

17 THE COURT: Mr. Shore, why aren't you satisfied by Ms.
18 Levitt's statement that the plan proponents are not -- have no
19 intention of relying on the mediation as a basis for approving
20 the plan or in the case of the FGIC, I mean we're not arguing
21 about the FGIC settlement now.

22 MR. SHORE: Well, I am going to ask for one
23 clarification because you said mediation and I said mediation
24 and I got reliance on mediator. I think that -- and that may
25 be where the distinction has been drawn in the past. Now I am

1 not getting it was reviewed by Judge Peck and approved by Judge
2 Peck. Rather, this was all part of an arms' length global
3 process in which everybody got in the room and we all talked
4 and the --

5 THE COURT: Well, whether they were all in the room or
6 not, I mean when -- because there were a lot of communications
7 that went on outside of the room. You know, as I've said
8 before, Judge Peck and I have not talked about the substance of
9 anything that went on during the mediation but I think it was
10 said here and in this much he's told me, I know he was making
11 the rounds having separate meetings with parties and then he
12 would communicate with others about it. So, yes, there were
13 the all hands mediation sessions. There's been discussion of
14 that at some prior hearings and there have been lots of
15 separate discussions that Judge Peck with parties and what I --
16 tell me again what aspect of what Ms. Levitt said are you is
17 giving you pause?

18 MR. SHORE: There are two issues. There are two
19 issues; one is, I do not believe the debtors cannot produce the
20 documents and argue anything about the mediation, whether it
21 was that the --

22 THE COURT: Well there was a mediation. I mean
23 everybody knows there was a mediation.

24 MR. SHORE: There's no question there was a mediation
25 and people showed up but statements like --

1 THE COURT: And you didn't.

2 MR. SHORE: Right. Well, we did, Your Honor.

3 THE COURT: Okay.

4 MR. SHORE: The --

5 THE COURT: It's your clients who didn't.

6 MR. SHORE: The fact that there were mediation
7 sessions, fine, we get all that. But statements that these
8 were arms' length, hard fought negotiations and whatnot, that's
9 where they start saying -- they start getting into the
10 substance. To the extent -- look, you don't need in a 9019 to
11 show that there were any negotiations. You could have decided
12 onto arbitrary numbers. The Court's going to have to make a
13 determination at that point as to whether that is an
14 appropriate number under the case law and the like but they
15 can't have it both ways. So it's not --

16 THE COURT: But there was -- let me just stop you
17 there for a second. There's one aspect about the mediation as
18 to which I already ruled and I don't think it has any impact
19 with respect to what you're all discussing now and at the
20 hearing on approval for the PSA, I don't remember whether you
21 took this position or not, there were a number of parties,
22 objectors to the PSA who took the position that the entire
23 fairness doctrine should apply because AFI was a party to the
24 PSA.

25 And in that respect, I didn't go back this morning to

1 look at the opinion, but I concluded that the business judgment
2 rule applied; entire fairness doctrine did not. The fact that
3 AFI was a signatory and was part of the mediation process I
4 concluded that entire fairness didn't apply. But that is the
5 only respect in which I've taken the mediation into account.
6 It's only with respect to what the standard for review was and
7 I know I explicitly did that.

8 MR. SHORE: Understood, Your Honor. I just want to --
9 and all I said today was with respect to the mediation
10 documents, let's just not throw them into a giant barrel of
11 documents. Let's keep them segregated because I believe based
12 upon what the debtors have in their disclosure statement, based
13 on the position they've taken in connection with FGIC at this
14 point, that they will be taking the position that Your Honor
15 should be making findings of fact with respect to the substance
16 of the mediation. If they don't, that may resolve that issue
17 entirely.

18 But let me make another point though. Your Honor
19 saying that the documents are strictly confidential does not
20 make them privileged from disclosure. The position that the
21 debtors want to take now is whether we log them or don't log
22 them, we are going to be asserting that the documents are
23 privileged. The fact that they may not be admitted into
24 evidence does not make them undiscoverable under Rule 26. They
25 may lead to the production of discoverable evidence, to the

1 extent they are produced. So all I am asking for today is to
2 have Your Honor --

3 THE COURT: If you're asking for all of the mediation
4 documents to be logged, I will give you two days to submit a
5 letter brief on why the mediation privilege is not a bar to the
6 discovery of the documents. Look, I'm not -- you know, the
7 mediation went on for what, five months, six months. I mean it
8 went on for a long time. There were lots of communications. I
9 see Judge Peck going in and out of the courthouse all the time
10 to make the rounds to everybody and I am not going to make
11 people log those unless and until -- and you're correct in this
12 respect, I don't want a bait and switch, not by you but by
13 other parties, to find out at the time of an evidentiary
14 hearing on the FGIC settlement or plan confirmation or your --
15 the JSN trial, that -- when I say bait and switch, that
16 suddenly proponents are arguing that, you know, because of the
17 mediation what was done in the mediation, the result of the
18 mediation, that I have to approve it and you're not entitled to
19 see what happened. So --

20 MR. SHORE: That's why I am trying to protect against,
21 Your Honor.

22 THE COURT: If -- and I analogize it -- I'm sure the
23 analogy is imperfect but analogize it to the reliance on advice
24 of counsel. If you're going to rely -- the analogy makes it
25 you're relying on the mediation, you can't -- you know, you're

1 going to have a harder time convincing me that I shouldn't
2 require disclosure, it's different than what comes into
3 evidence but I shouldn't require disclosure of communications
4 relating to the mediation.

5 Mr. Horowitz, you want to say something?

6 MR. HOROWITZ: Yes, thank you, Your Honor. I did
7 just -- I think it's important to note there is a distinction
8 between the advice of counsel situation and the distinction is
9 this. We don't actually have the power to divulge these
10 documents. The general order M-390 states you know, in Section
11 5.1, "Any statements made by the mediator, by the parties or
12 others during the mediation process shall not be divulged by
13 any of the participants in the mediation or their agents or by
14 the mediator to the Court or any third party."

15 THE COURT: So you would agree then that the
16 proponents of either the FGIC settlement or of the plan and
17 disclosure statement can't rely on anything that occurred
18 during the mediation, other than -- I mean we've got -- there's
19 a proposed plan that people have signed onto a PSA saying
20 they'll support it if it's consistent with it.

21 MR. HOROWITZ: I do agree with that, Your Honor. I'm
22 just saying that to the extent Mr. Shore or the Court is
23 concerned with the bait and switch, given that there is no
24 power to -- like there is to waive attorney-client privilege
25 here, there is no power to divulge. I think Judge Peck might

1 have something to say about that.

2 If somebody tries, I think the appropriate response is
3 for the Court to ignore or --

4 THE COURT: Okay.

5 MR. HOROWITZ: -- preclude that kind of argument, not
6 to say ah-hah, you've waived the privilege. It's not a
7 privilege.

8 THE COURT: Okay.

9 MR. HOROWITZ: I haven't used the term mediation
10 privilege.

11 THE COURT: That's fine.

12 MR. HOROWITZ: It's a rule against disclosure of
13 mediation materials.

14 THE COURT: And I made clear before, you know, I can't
15 imagine ordering disclosure of what went on in the mediation.
16 Now the one thing that, you know -- if some party violates the
17 rule, we'll deal with it at the time.

18 MR. HOROWITZ: Okay.

19 MS. LEVITT: Your Honor, if I just may clarify. I'm
20 just wondering why we are briefing the question of mediation
21 documents now when it has nothing to do with this hearing and
22 may come up later and FGIC --

23 THE COURT: But I read the letters -- what you're
24 saying seems to make sense but if I am going to hear every week
25 from Mr. Shore that he thinks that this stuff has to be logged,

1 I want to deal with the issue right now.

2 MS. LEVITT: Thank you, Your Honor.

3 THE COURT: And --

4 MR. HOROWITZ: I did mean to mention that, Your Honor.

5 I can only speak for the committee but Mr. Shore's request that
6 when we are going through and reviewing and tagging documents
7 for withholding, we agreed that we will tag specifically --

8 THE COURT: Okay.

9 MR. HOROWITZ: -- why it is withheld. I don't
10 understand him to be asking for a log at the moment. I
11 understand him to be asking for segregation and speaking for
12 the committee, that's something we can do. We don't anticipate
13 it will ever become necessary to use those tags.

14 THE COURT: All right. Are you satisfied with that,
15 Mr. Shore?

16 MR. SHORE: If, in fact, look --

17 THE COURT: You didn't answer my question; yes or no?

18 MR. SHORE: Yes, if in fact what they're doing is they
19 are breaking it down between attorney-client communication --
20 we can go over the categories when we sit down but they've got
21 to do something more than privileged. It's got to be
22 specifically to mediation privilege, work product protection,
23 with respect --

24 THE COURT: But that's the whole point, the issue is
25 are they going to have to log it, okay?

1 MR. SHORE: And what I said with respect to the
2 logging is it may or may not be necessary -- first of all, it
3 may or may not be prohibitive to log it. The reason you don't
4 log it individually is only because you're looking at a 5,000
5 page privilege log which nobody gets anything out of anyway.
6 So, it may be a limited number of documents within a certain
7 subset of documents.

8 But with respect to actual logging when we get there,
9 we may not need to go through the production of a 5,000 page
10 log if, in fact, they don't for example, take the position that
11 the mediation is somehow relevant to a phase one, phase two
12 issue. The position I've been getting from the debtors is
13 we're just not going to not even log, we're just not going to
14 go through and talk about why it's in this 7,000 document --

15 THE COURT: And you think they have to log it?

16 MR. SHORE: I don't think they have to log right now.
17 I think what they have to do is they have to specify which of
18 the individual categories it goes to.

19 THE COURT: If they don't log it, I don't understand
20 what that means, Mr. Shore. Okay. Look, I'm going to put a
21 stop to this right now. Mr. Shore, if you think they have to
22 log the documents, I want a letter brief by Wednesday at 3
23 o'clock. Okay? And I mean we -- and so you sort this out when
24 you leave court today.

25 If you can't resolve it, I want letter briefs from

1 both sides. Hopefully the committee and the debtor will just
2 submit one letter --

3 MS. LEVITT: Yes, we will.

4 THE COURT: -- by 3 o'clock on Wednesday. And we'll
5 have a hearing, if necessary, on Thursday at 2 o'clock. Okay?
6 This seems an utter waste of time to me, okay? I agree with
7 Mr. Horowitz, this is even -- this is a clearer case than the
8 reliance on advice of counsel because our general order with
9 respect to mediation makes it clear, it can't be disclosed
10 period; full stop.

11 I am going to limit the letter briefs to five pages
12 each. I don't think this is a complicated issue but I want
13 this put to rest.

14 MS. LEVITT: Your Honor, there was one last issue in
15 the junior secured noteholders' letter. I don't believe it's
16 at all an issue. It has to do with financial advisors. I
17 think we don't need to bother the Court. We have absolutely
18 not taken the position they said in their letter. We agreed at
19 the meet and confer that we would log documents between
20 financial advisors and clients that might be privileged. We
21 will produce those that are not privileged. The only thing
22 that we had agreed upon as an exception is that no party had to
23 log communications between their financial advisor and their
24 lawyers because those are undoubtedly privileged. I thought
25 that was the party's agreement. If it's not, that's what we

1 would propose that the Court enforce.

2 THE COURT: Mr. Shore?

3 MR. SHORE: Other than that they're undoubtedly
4 privileged, I don't know that they are or are not undoubtedly
5 privileged but they don't need to log the individual ones that
6 go between the attorneys and the FAs with respect to the
7 production of materials.

8 THE COURT: What's good for one of you is good for all
9 of you, so --

10 MR. SHORE: Understood. Direct communications between
11 the clients or the debtors in that instance in the FAs will be
12 either produced or logged. The other ones won't.

13 THE COURT: Everybody agrees with -- about that? You
14 have to answer yes, sir, Mr. Horowitz.

15 MR. HOROWITZ: Yes, Your Honor.

16 THE COURT: On behalf of the committee, Ms. Levitt?

17 MS. LEVITT: Yes, Your Honor, I thought that was
18 audible.

19 THE COURT: All right. Are you satisfied with that
20 response, Mr. Shore?

21 MR. SHORE: Yes, Your Honor.

22 THE COURT: Okay. To the extent there are unresolved
23 issues about discovery, so I've given you a deadline for letter
24 briefs, we'll have a hearing on Thursday at 2 o'clock. You can
25 advise me whether it's necessary to go forward with that

1 hearing or not. Hopefully, it won't be necessary, all right?
2 But I want to keep this train moving down the tracks, all
3 right?

4 MS. LEVITT: Will do, Your Honor.

5 THE COURT: And likewise, the -- if you have not, you
6 need to resolve the statement of issues by Wednesday at 3
7 o'clock, as well. All right? That's a couple of days to -- I
8 know you've got --

9 MR. HOROWITZ: That will be good, Your Honor.

10 THE COURT: -- motions to dismiss that you're working
11 on, Mr. Horowitz but -- okay. And we'll take that up on
12 Thursday -- if necessary, I'll take that up on Thursday, as
13 well. All right? Hopefully it won't be necessary.

14 All right. Anything else for today?

15 MS. LEVITT: No.

16 THE COURT: All right. We're adjourned. Thank you
17 very much.

18 (Whereupon these proceedings were concluded at 11:43 AM)

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C E R T I F I C A T I O N

I, Linda Ferrara, certify that the foregoing transcript is a true and accurate record of the proceedings.

Linda Ferrara

LINDA FERRARA

AAERT Certified Electronic Transcriber CET**D-656

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Date: July 16, 2013